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IN THE

Supreme Court of the United States

October Term, 1957

No. 984

MERWIN LIGHTERAGE CO., INC., PETITIONER

v.

VIRGIN ISLANDS CORPORATION, RESPONDENT
(In Admiralty)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which reversed the judgment for the petitioner of the District Court of the Virgin Islands, Division of St. Croix at Frederiksted, in Admiralty, and remanded the cause for further proceedings consistent with its opinion to determine petitioner's liability in damages.

I.

OPINIONS OF THE COURTS BELOW

The opinion of District Judge Herman E. Moore of the District Court of the Virgin Islands Division of St.

Croix at Frederiksted, in *Virgin Islands Corporation* v. *Merwin Lighterage Co., Inc.*, dated February 28, 1957, reported in 149 Fed. Supp. 269, appears in full in the appendix hereto at page 22. Reargument was heard on respondent's motion, and on May 23, 1957, District Judge Moore affirmed his opinion dated February 28, 1957 and judgment for petitioner was entered. (Appendix, page 29). The opinion of Circuit Judge Hastie of the United States Court of Appeals for the Third Circuit in *Virgin Islands Corp.* v. *Merwin Lighterage Co.*, C.C.A., 3rd, reported in 251 Fed. 2nd 872 appears in full in the appendix hereto at page 31.

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Review is sought of the judgment of the United States Court of Appeals for the Third Circuit in No. 12305 entered on the docket of the Court of Appeals on February 7, 1958. Record of the judgment, showing thereon the date of its entry, appears in the appendix hereto at page 36.

The Act of June 25, 1948, c. 646, 62 Stat. 928; 28 U.S.C. 1254(1) and Rule 19 of the Revised Rules of the Supreme Court of the United States, are believed to grant jurisdiction to this court to review the judgment in question by writ of certiorari, on the grounds that the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter, has decided a Federal question in a way in conflict with applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court of Appeals for the Third Circuit err when it found Respondent, Merwin Lighterage Co., Inc., guilty of negligence, and reversed the judgment below?

2. Does the Circuit Court of Appeals for the Third Circuit have the power under Rule 52(a) of the Federal Rules of Civil Procedure to reverse the findings of the trial court?

3. Where the trial judge, in an action for cargo loss and damage, on oral testimony before the judge without a jury, after having had full opportunity to evaluate the credibility of witnesses, finds that the direct evidence and permissible deductions therefrom exonerate the petitioner from liability, and that petitioner was not negligent, but that a sudden, violent, freakish storm was the direct cause of the loss, which findings are amply supported by the evidence and hence not clearly erroneous, has the Court of Appeals the power to reverse such finding under Federal Rules of Civil Procedure, Rule 52(a)?

IV.

RULES INVOLVED

The rules involved are Federal Rules of Practice in Admiralty and Maritime Cases, Rule 46 1/2, 28 U.S.C., which provides:

> "In deciding cases of admiralty and maritime jurisdiction, the Court of first instance shall find the facts specially and shall state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, it shall be included by the clerk in the record which is certified to the Appellate Court under Rule 49."

and Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C., which in pertinent part provides:

> "In all actions tried upon the facts without a jury . . . the Court shall find the facts specially . . . Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnessess. . . ."

V.

STATEMENT OF THE CASE

On August 26, 1952, Merwin Lighterage Co., Inc., of the Virgin Islands under agreement with Alcoa Steamship Company proceeded to lighter from "S.S. Alcoa Puritan" to shore at the Port of Frederiksted, Virgin Islands, a shipment consigned to Virgin Islands Corp. consisting of one package generator in twenty-eight boxes. The Port of Frederiksted is an open port and has neither harbor nor dock, but a wharf. Consequently, steamships must anchor off shore, and cargo must be discharged onto lighters to be taken to the wharf.

Lighterage operations were started from the "S.S. Alcoa Puritan" early on the morning of August 26, 1952 in normal weather. However, a squall and/or ground sea began to build up during the morning, and reached a point of intensity about noon or afternoon, where the barges could not discharge their cargo ashore at the wharf, but had to be taken to their moorings for the night. Two such barges, one known as the "plywood barge" and the other, the barge in question, known as the "B-2" were so moored. The "plywood barge" survived the storm for the night and the "B-2" lost its cargo into the sea.

It is for the loss of this cargo that respondent, Virgin Islands Corporation, brought suit, alleged negligence on the part of the petitioner, and claimed

1. That the barge "B-2" was unseaworthy,

2. That respondent, Merwin Lighterage Co., Inc., was negligent in accepting the cargo from the "S.S. Alcoa Puritan" under the prevailing weather conditions, and

3. That respondent, Merwin Lighterage Co., Inc., was negligent in not lashing down the cargo on the barge "B-2" before mooring it for the night, as was done on the "plywood barge" which did not lose its cargo.

Evidence was introduced in support of Merwin Lighterage Co.'s contentions that

1. the barge "B-2" was seaworthy,

2. that the storm which developed was a "freak" storm which came up suddenly, so that it had no notice of the storm when it accepted the cargo, but that the storm so suddenly increased in intensity that it had to move the barge from the "S.S. Alcoa Puritan" to keep it from breaking up against the ship, and

3. that the cargo could not be lashed down due to the roughness of the sea, and that therefore the cargo was lost by "act of God" with no negligence of Merwin Lighterage Co. contributing thereto.

The case was heard and oral evidence adduced on June 15 and September 21, 1955, just less than, and just more than three years after the occurrence. The testimony was blurred by the lapse of time and to a considerable extent, inconsistent. The trial judge, who saw and heard the witnesses, and had an opportunity to question them, had to evaluate the testimony. He found that there was no dispute as to the value of the total loss which was $27,821.48, but that Merwin Lighterage Co. contended its liability was limited. He further found it unnecessary to go into the question of limitation of liability until after determination of whether or not Merwin Lighterage Co. was guilty of negligence, either before, or

in the face of the storm, to determine whether or not it was liable in damages.

The trial judge found that the rough sea began to build up about 10:00 A.M.; that landing operations of the barges were completed about 3:30 or 3:45 P.M.; that either at that time or sometime before, it was discovered that the sea was breaking in and was too rough for the barges to go ashore and that they would have to be taken to the moorings to await abatement of the rough sea. Both barges were *taken to the moorings.* The storm, however, increased in intensity during the night, and sometime between 12 Midnight and 2:00 A.M., the packages on barge "B-2" were washed into the sea. The packages on the "plywood barge" were not washed into the sea. The testimony of one witness, Henry Walcott, showed the packages on the barge "B-2" were not lashed down, whereas the packages or cargo on the "plywood barge" were lashed down.

The trial judge also found that questions unanswered by the evidence were (1) whether the barge "B-2" was fully or partially loaded when it was discovered that the barges could not reach the dock; (2) whether the barge "B-2" and the "plywood barge" were loaded at the same time, or which was loaded first; (3) whether either barge had discharged any previous loads at the dock; (4) whether lashing down would have saved the cargo on barge "B-2"; and finally, whether in the sudden rough weather the cargo on barge "B-2" could have been lashed down. He found: "The only conclusion from the evidence is that it could not have been lashed down, as it was too hazardous."

The trial judge quotes a witness for Virgin Islands Corporation, Henry Walcott, as testifying that the sea was not rough when barge "B-2" was brought alongside the "S.S. Alcoa Paritan", that he cannot remember when the barge was brought alongside the ship, and that he

cannot remember how long it took to load the barge, but that it was not loaded to capacity. Walcott testified he tried to lash the cargo down after the sea got rough but was unsuccessful; and that he was the "pumpman," but that barge "B-2" was not leaking. He testified there were originally four other men on the barge and in answer to question from respondent's proctor he testified they were trying to lash the cargo down, but that they already had left the ship and "the four men stay on the next lighter." He verified a statement that if it (barge "B-2") had been kept alongside the ship long enough to lash the cargo down, the barge might have been smashed up, so they stopped trying to lash the cargo down and went right from the ship's side to the mooring.

The evidence does not show further whether the sea was too rough to lash the cargo down, either at the mooring or enroute thereto, but the trial judge found that the evidence of Henry Walcott and of other witnesses tended to show that it was a dangerous operation. Walcott stayed on barge "B-2" until after the middle of the night when that barge discharged its cargo into the sea, whereupon he swam ashore.

The trial judge found that "While some portions of the evidence conflict, it is clear that the weather was calm in the morning and attained gale force at night; that the weather was freakish and unpredictable and that *the storm was the direct cause of the loss of the cargo.* From the state of the testimony, it is not clear, beyond a fair preponderance of the evidence, that there was negligence on the part of the respondent or its agents which directly contributed to the loss of the cargo, when all things are considered, to wit: The Frederiksted seaport is an open roadstead and the stormy weather occurred during what is known in the Island as 'the hurricane season'; that the storm that day was rather sudden, freakish and unpredictable. There is no evidence that the barge 'B-2' was unseaworthy. The foreman and longshoremen

engaged in the lightering of the cargo were veterans in this work, some with over fifteen years of experience. From the evidence, it appears that both the 'plywood lighter' and the 'B-2' went out to lighter the cargo; that it was only after the 'plywood lighter' discovered that it could not return to the dock that it was decided to take the 'B-2' to the mooring on account of the bad weather; that the rough seas and squally weather prevented the lashing down of the cargo on the 'B-2' and, even if it were lashed down, there is no certainty that the 'B-2' would not have foundered and the cargo sunk. While it is true that it would have been better not to have taken on the cargo, it must be remembered that at the time the lighters went out to the 'S.S. Alcoa Puritan' the weather presented no threat to the lighters or cargo; that this hazard subsequently developed, and the 'S.S. Alcoa Puritan' itself was obliged to fight the stormy weather and heavy swells. The evidence shows that the 'B-2' could not remain close to the 'S.S. Alcoa Puritan' and, as it could not go to the dock, there was nothing else to do but to tow it to the mooring. There is no evidence that any public or official notice was given of an impending storm, as is usually the case when a storm is anticipated. The evidence and records of the officers from the Coast Guard stationed at Frederiksted does not reveal any such storm brewing." (Italics supplied).

The trial judge went on to find that in describing the treacherous and unpredictable kind of weather experienced that day, one of the witnesses, Anthon Roberts, who was one of the foremen in charge of the lighters with fifteen years of experience lightering at Frederiksted, testified that the storm was a freak, because the morning was pleasant and the storm just came in suddenly. Roberts said there was no warning that it was going to turn up, but suddenly there was a gush of wind and then heavy sea followed immediately; that they had gushes of wind and rain; that it was blowing in a gushing form.

That witness estimated the seas were about twelve feet in height.

In summing up the evidence, and reaching his conclusion thereon, the trial judge stated:

> "This Court agrees fully with the argument of proctor for the libellant herein [Virgin Islands Corp.] that the respondent [Merwin Lighterage Co.] cannot claim an act of God if its negligence in the circumstances also contributed to the loss, but in the state of the testimony herein this Court is of the opinion that from the evidence it cannot be said that the testimony proves negligence by a fair preponderance, without the unwarranted assumption that despite Henry Walcott's testimony the sea was not too rough to lash down the cargo on barge 'B-2.' There is no evidence to show that the sea was not too rough, or the operation not to hazardous."

Based upon all the evidence heard and proofs presented, the Trial Court, on February 28, 1957, handed down its opinion holding that negligence on the part of petitioner was not proved by a fair preponderance of the evidence, but that the gale-force storm which developed late at night was the *direct cause of the loss of the cargo.*

Respondent thereupon filed a Motion for a Reargument of the question of negligence. The case was reargued May 22, 1957, after which the Trial Court ordered the motion denied, reaffirmed its opinion of February 28, 1957, and thereupon ordered judgment entered for the petitioner. (Appendix, page 29).

Appeal was taken by Virgin Islands Corporation to the United States Circuit Court of Appeals for the Third Circuit. That Court speaking through Circuit Judge Hastie reviewed the facts, somewhat softening them from the facts as found by the trial judge, recognized that the trial judge found the loss had resulted from "inevitable accident" entering a decree exonerating the petitioner, and stated that in their view "the undisputed facts evalu-

ated in the light of correct legal principles, compel a finding that the respondent [Merwin Lighterage Co.] did not exercise due care for the protection of libellant's [Virgin Islands Corp's.] property." The Court of Appeals stated that the fact that unusually severe weather had been a factor in causing cargo damage was not enough to establish the defense of "inevitable accident" resulting from "peril of the sea"; that it must also be shown that weather conditions were more than a staunch and adequately equipped vessel, with its cargo properly secured, could have withstood (citing cases). That court contrasted the fact that the "plywood barge" rode out the storm without discharging its cargo which had been lashed down with the fact that the unsecured cargo on the "B-2" was cast overboard and concluded: "This unusual situation of the contrasting experiences of two lighters moored in the same roadstead during a storm compels the conclusion that this mishap was not an inevitable accident." The Court of Appeals, however, ignored the finding of the trial judge that "the only conclusion from the evidence is that it could not have been lashed down, as it was too hazardous," and makes no finding to the contrary.

The Court of Appeals shifted from the respondent the burden of proving negligence, placed on the petitioner the burden of coming forward with some exculpatory showing to prove lack of negligence and concluded that in the case at bar the evidence reinforced the presumption of fault on the part of petitioner bailee. To substantiate its position, the Court of Appeals quoted from the opinion of the trial judge: "there is no evidence to show that the sea was not too rough [for lashing down the cargo of the 'B-2'] or the operation not too hazardous." The Court of Appeals found: 'First, the cargo of the 'plywood barge' loaded only a short time before the 'B-2' was lashed down. Second, weather observations taken from the log of the ship from which the cargo in question was unloaded . . . showed Force 3 winds at midday diminishing to Force 2 at 4

P.M.," and concluded therefrom that it would have been feasible to have secured the deck cargo on the "B-2," without taking into consideration the fact that the waves may have continued as heavy as during the Force 3 winds. The Court of Appeals also found that employees of the respondent started to lash down the cargo while the "B-2" was being loaded alongside the ship, however, wave action was pounding the lighter against the ship's hull and it was deemed expedient to load as quickly as possible so that the lighter could be towed away from the ship, but the failure again to undertake the securing of the cargo after the lighter was clear of the ship remained unexplained, except that the lashing operation would have been too much for the remaining lighterman. The Court of Appeals thereupon concluded that this gave a picture of neglect of an obvious and indicated precaution, not of natural forces making that precaution impracticable.

The Court of Appeals concluded that on the entire record they could not avoid the conclusion that petitioner's fault, as well as the stormy weather, played a substantial part in the loss of the cargo, that the District Court also should have so found and, therefore, should have held petitioner legally liable for the cargo loss. That Court recognized that there was an issue concerning limitation of liability which the District Court did not reach in its disposition of the libels and entered judgment reversing the judgment of the District Court and remanding the cause to that Court for further proceedings consistent with their opinion.

VI.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals for the Third Circuit has ignored the provision of Federal Rules of Civil Procedure, Rule 52(a), that in all actions tried upon the facts without a jury, the Court shall find the facts and those findings

shall not be set aside unless clearly erroneous, due regard to be given to the opportunity of the trial court to judge the credibility of the witnesses.

2. The Court of Appeals for the Third Circuit has purported to accept the findings of fact by the trial judge, but then has purported to "evaluate them" in the light of what it refers to as "correct legal principles." It is submitted that the Circuit Court of Appeals has no authority to re-evaluate the findings of the Trial Judge, and that if it has such power, nevertheless in the purported evaluation it has disregarded certain findings of fact made by the trial judge, and has given more weight to some testimony and less to other, than the trial judge deemed appropriate. In taking this action, the Court of Appeals for the Third Circuit has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, for in taking such action the Court of Appeals exceeded the power conferred on it by Federal Rules of Civil Procedure, Rule 52(a), as that power is defined by this Court.

3. Assuming all to be as the Court of Appeals has found it, the decision not to lash down the cargo was "an error in navigation" on the part of one of the employees or agents of petitioner and not an act of negligence imputable to the petitioner.

VII.

ARGUMENT

A. *The findings of the Trial Court should not be set aside or reversed unless they are clearly erroneous.*

The pertinent provisions of Federal Rules of Civil Procedure, Rule 52(a), provide:

> " . . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses . . ."

It is a generally accepted principle that while admiralty appeals are recognized as new trials, findings of fact reached upon conflicting testimony and based upon the credibility of witnesses whom the District Court judge saw and heard will not be reversed unless clearly erroneous. *Reiss SS Co.* v. *Great Lakes Towing Co.*, 177 Fed. 2nd 681.

In *McAllister* v. *United States*, 348 U.S. 19, the District Court sitting without a jury made findings of fact and stated its conclusions of law thereon in accordance with Admiralty Rule 46½, in which it found respondent not guilty of negligence in the treatment of petitioner after he became ill, but found it guilty of negligence in permitting conditions to exist on board ship which were conducive to the transmission of polio and rendered judgment for damages for the petitioner. The Court of Appeals, on the findings of the trial court, reversed the judgment on the ground that no proximate cause was found between the negligence of respondent and the contraction of polio by petitioner. Mr. Justice Minton, speaking for the Supreme Court, stated: "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside a judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure." He went on to declare: "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,' *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339; *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 . . . The question, therefore, is whether the findings of the Dis-

trict Court are clearly erroneous." Judgment of the Court of Appeals reversed.

In *Rogers* v. *Pacific Atlantic SS Co.*, 170 Fed. 2nd 30, it was held that "where the entire case in admiralty rests on conflicting oral testimony the trial court should not be reversed except for inherent improbability or plain error. What constitutes "clear error" is amply discussed in Section 573 of *Benedict On Admiralty.* (And see, Lortie v. American-Hawaiian S.S. Co., 78 Fed. 2nd 819).

In a less recent decision of this Court, the question of the scope of review in admiralty appeals was clearly dealt with when the Court held that: "The rules governing appeals in admiralty are said in the foregoing respects to be the same as in appeals from judgments in civil actions tried by the Court without a jury. In short, an Appellate Court has been said to have no broader power to review under Admiralty Rule 46½ than it has under Rule 52(a) of the Rules of Civil Procedure." See *Coryell* v. *Phipps*, 317 U.S. 406.

Although Appellate Courts in the past may have felt themselves at liberty to reverse findings of fact made by a trial judge sitting in admiralty, on the principle that an admiralty appeal was a trial *de novo*, the Court of Appeals in *Texas Company* v. *R. O. O'Brien & Co.*, 242 Fed. 2nd 526, 529, 1957 A.M.C. 605, 609 stated, "this is no longer the law. The present admiralty rule is that findings are not to be reversed unless 'clearly erroneous,' comparable to Fed. Rules Civ. Proc. 52(a). *McAllister* v. *United States*, 348 U.S. 19, 1954 A.M.C. 1999 (1954). * * * In our opinion Rule 52(a) unambiguously governs all findings, and its additional caveat, that due regard is to be given to the trial court's opportunity to judge credibility, is merely cautionary advice, not a variation in the scope of review."

Factual inferences and deductions from basic facts utilized by the trial court in reaching its Findings of Fact are within the rule. The decisions in this and other juris-

dictions make a distinction, however, between inferences drawn from the evidence in arriving at findings of fact, such as evaluating the relative credibility of witnesses in determining the existence or non-existence of a disputed fact, and inferences and conclusions drawn from basic facts which the trial court has already found.

In the instant case, the Trial Court at page 5 of its Opinion (See Appendix, page 26) found as follows:

> "While some portions of the evidence conflict, it is clear that the weather was calm in the morning and attained gale force at night, that the weather was freakish and unpredictable and that *the storm was the direct cause of the loss of the cargo.* From the state of the testimony it is not clear, beyond a fair preponderance of the evidence, that there was negligence on the part of the defendant or its agents which directly contributed to the loss of the cargo . . ." (Italics supplied).

B. *Petitioner has borne the burden of proving that the alleged loss resulted from an "act of God" or inevitable accident.*

An inevitable accident is an "act of God". That is, any accident produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness; see *Fish* v. *Chapman,* 2 Ga. (2 Kelly) 349, 356; 46 Am. Dec. 393. The words "inevitable accident" when used in law to designate the mode by which loss has or may happen to a common carrier, are synonymous with the phrase "act of God." *Neal* v. *Saunderson,* 10 Miss. 572, 576; 41 Am. Dec. 609.

In the instant case, the most reliable testimony shows that while barge "B-2" was moored in Frederiksted roadstead a freak, unforeseeable, and intense storm developed. Henry Walcott testified that the barge "B-2" was safe and dry up to around midnight August 26 to 27, 1952, whereafter the waves reached a height of about twelve feet,

which continued until about 2 o'clock in the morning. (Testimony,* pages 10, 16).

The fact of the severity of the sudden and intense storm which developed shortly after midnight is corroborated by the testimony of Patrick Lucas, who described the waves as "mountain high." (Testimony, page 60). Anton Roberts testified that they were about twelve feet high during the night (Testimony, page 72) and James Hurd estimated that the storm reached "gale force" during the night. (Testimony, page 79).

Nowhere in the testimony presented to the Trial Court was there any showing that the loss would have occurred as a result of any cause other than the advent of the above described "act of God." Conversely, the uncontroverted testimony of Henry Walcott shows that barge "B-2", despite the heavy weather that developed during the late afternoon and evening of August 26, 1952, safely held all of its cargo during that entire time and up until past midnight when the unpredicted, severe and localized storm developed in the Frederiksted roadstead. Then, only when the "B-2" barge "got tripped up" in the trough of the seas did the waves begin breaking over it in a manner to wash the cargo overboard. (Testimony, page 10, 12, 14). The phrase "tripped up" means that the barge was too short to ride those waves and that it got caught in the trough between crests (particularly when swinging around with the tide), so that the following wave broke over the barge. In such circumstances, it is reasonable to assume that with heavy waves breaking over the side of the barge, the heavy crates would have broken a one-half inch rope and would have been cast into the sea even if they had been lashed down, whereas on the larger "plywood barge" (Testimony, page 98) that did not get

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* All references to testimony relate to that adduced on June 15, 1955.

"tripped up" such crates would have survived the storm even if they had not been lashed down.

Clearly, therefore, the loss of the cargo did not result from the unseaworthiness alleged by libellant, nor by the negligence of petitioner in failing to lash it down, as developed subsequently at the trial, but rather from a supervening cause beyond the control of petitioner, for which it could not be held liable. Had the "B-2" been as long and large a barge as the "plywood barge" there is no indication it would have discharged its cargo into the sea.

Yet the Court of Appeals wholly ignores the fact of the heavy seas that built up during the middle of the afternoon and which, independent of the force of the wind, rendered the task of continuing work on the barge "B-2" extremely hazardous; nor does it take into consideration the gale force seas which caused the barge to become "tripped up" after midnight. Instead, it rests its opinion upon an evaluation of the force of the winds which were reported on the ship's log during the afternoon--a factor which may have been totally unrelated to the actual conditions faced by the men working on the barges alongside the "Alcoa Puritan."

C. *Petitioner carried its burden of showing lack of negligence on its part.*

The Virgin Islands Corporation in its libel specifically alleged that the loss or damage resulted from the fact (1) that respondent below furnished an unseaworthy barge, (2) that respondent below breached its implied warranty of seaworthiness of the barge, (3) that said barge was improperly manned, equipped and supplied, and (4) that respondent below permitted said barge to moor, and remain moored in an exposed area, thereby permitting waves to fill the barge to water level and wash appellant's cargo into the sea. Nothing was said in the

libel concerning the failure of respondent below to lash the cargo to the barge. That point was developed exclusively on the testimony of one witness, Henry Walcott.

Petitioner (the respondent below) met the allegations of the complaint with evidence to the effect that barge "B-2" was seaworthy, was properly manned, equipped and supplied, and that the freakish and utterly unusual storm of gale force cast the cargo into the sea, with no negligence on the part of the petitioner. The question of lashing down the cargo was not mentioned until the testimony of Henry Walcott at the trial. Petitioner has met that charge to the extent required to carry its burden of proof that it was not guilty of negligence. It must be remembered that several of the witnesses were fishermen who served as part-time stevedores and who were fairly illiterate, as is evidenced from the transcription of their testimony, including Henry Walcott's statement, " I cannot read much." (Testimony, page 9). The oral testimony was given just less than, and just more than three years after the accident. There was much blurred and inconsistent testimony. The trial judge had the opportunity to see, hear, and evalute the testimony of the several witnesses, and reached his conclusion, filed 28 February, 1957, that there was no showing of negligence on the part of respondent below. On motion of respondent, the Trial Judge heard reargument on the question of negligence, May 22, 1957, and reaffirmed his opinion on May 23, 1957. (Appendix, page 29).

That the petitioner adequately carried the burden of proof of the absence of negligence on its part is found in the concluding words of the trial judge when he said:

> "This Court agrees fully with the argument of proctor for the libellant herein that the respondent cannot claim an act of God if its negligence in the circumstances also contributed to the loss, but in the state of the testimony herein this Court is of the opinion that from the evidence it cannot be said that

the testimony proves negligence by a fair preponderance, without the unwarranted assumption that despite Henry Walcott's testimony the sea was not too rough to lash down the cargo on 'B-2'. There is no evidence to show that the sea was not too rough, or the operation not too hazardous."

D. *Alleged negligence may have been only an error in navigation.*

It is submitted that the evaluation of negligence at sea is on a different level from the evaluation of negligence on shore. At sea, those in charge must make decisions in the teeth of existing circumstances. The expression of one being "at sea" arises from the fact that when at sea, one is by no means master of the situation, but a pawn in the hands of *force majeure*. Therefore, the determination of whether or not to risk the safety, or the very lives of the longshoremen to attempt to lash down a cargo while the seas were running excessively high had to be made in the face of existing circumstances. Failure to attempt to lash down that cargo, therefore, may have been an error in navigation, but not an act of negligence. Merwin Lighterage Company, Inc. cannot be held accountable for "an error of navigation" comitted by one of its employees.

Commercial Molassas Corp. v. *N.Y. Tank Barge Co.*, 314 U.S. 104, involves a situation where a molasses barge was being loaded and sank due to what was admitted to have been faulty stowage. The barge operator's employee admittedly turned a wrong valve. However, this was held to constitute an error in navigation and thus was not negligence. In that case the sea was smooth and weather conditions normal. Nevertheless, judgment for the barge owners and operators was affirmed due to the fact that no showing was made by the cargo owner to substantiate its allegation that the barge was in any respect unseaworthy, or the barge owner negligent. (And see same case, 114 Fed. 2nd 248).

E. ***No findings by Court of Appeals that finding by Trial Judge of no negligence on part of petitioner was clearly erroneous.***

The Court of Appeals makes no finding of fact to show that the conclusions of the trial judge were clearly erroneous. For example, although the appellate court refers to the winds diminishing from Beaufort Scale Force 3 at midday to Force 2 at 3 P.M., it makes no finding as to the size and nature of the sea, which testimony indicated was building up during this period. It does not, therefore, show that the conclusion of the trial judge that it would have been impossible, or extremely hazardous, to have made any greater effort to lash down the cargo on barge "B-2" was erroneous. Nor does the fact that the "plywood barge" on which the cargo was lashed down rode out the storm, whereas barge "B-2" succumbed to the storm, prove that had the cargo on barge "B-2" been lashed down, it would not have been cast into the sea. (Testimony, page 33).

The evidence clearly shows that the "plywood barge" was the larger of the two, and was able to ride the waves. Henry Walcott testified (Testimony, page 14) that barge "B-2" was "tripped up" by the heavy seas that began running around midnight. (See explanation of the phrase "tripped up," Supra page 16). Walcott testified that barge "B-2" was not full of water, but was riding high, only the waves were breaking over it. (Testimony, pages 11, 15, 16). The appellate court ignores the fact that the heavy seas between midnight and 2 A.M. were catastrophic insofar as barge "B-2" was concerned, a fact which the trial judge recognized.

The Court of Appeals states that witnesses for petitioner contrasted the very severe late evening weather with the moderately high but not unusual seas created by shifting winds and occasional squalls in the afternoon and early evening. The appellate court apparently ignores

the fact that those witnesses were all shore personnel and not barge men who had been aboard the barges. Contrast the testimony of those who were aboard the barges, who testified that the waves were such as to prevent any other action than was taken.

From the foregoing, it is clear that the Trial Court in reaching its Findings of Fact, including the finding of no negligence on the part of the petitioner, considered all of the testimony and evidence before it. The inescapable conclusion from the other facts found point to the finding of no negligence on the part of the petitioner. Therefore, the libellant has not proved that negligence on the part of petitioner caused the loss, but petitioner has borne the burden of proving that an act of God, with no negligence on its part, was the direct cause of the loss of the cargo.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari, should reverse the judgment of the Court of Appeals for the Third Circuit, and should affirm the judgment of the United States District Court of the Virgin Islands.

Respectfully submitted,

.....

HENRY F. BUTLER
Attorney for Petitioner

JOHN D. MERWIN,
Of Counsel

APPENDIX

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

DIVISION OF ST. CROIX AT FREDERIKSTED

IN ADMIRALTY, FOR CARGO LOSS AND DAMAGE
CIVIL NO. 20-1954

VIRGIN ISLANDS CORPORATION, Libellant

vs.

MERWIN LIGHTERAGE CO., INC.
in personam,
Respondent

OPINION

This is an action in admiralty, for cargo loss and damage brought by the libellant, Virgin Islands Corporation, against the Merwin Lighterage Company, Incorporated. Libellant is represented by its proctors, Warren Young, Esquire, and Bingham, Englar, Jones and Houston, Warren H. Young, Esquire, of counsel. Respondent is represented by its proctor, John D. Merwin, Esquire.

The complaint herein was filed on September 30, 1954. This matter came on for hearing June 15 and September 21, 1955. Thereafter, transcript of all testimony was made, and, thereafter, both sides submitted briefs and oral arguments.

A brief statement of the facts is as follows: On August 26, 1952, the "SS Alcoa Puritan" arrived at the Port of Frederiksted, with a shipment consigned to the libellant herein, consisting of one package generator in twenty-eight boxes. The port of Frederiksted is an open port, and has neither harbor nor dock, but what is known as a wharf. Consequently, steamships must anchor off shore, and cargo must be discharged into lighters to be taken ashore to the wharf. The respondent is a lighterage company, which on the aforesaid date, August 26, 1952, had an agreement with Alcoa Steamship Company to lighter all such cargo to this wharf.

Lighterage operations were started from the "SS Alcoa Puritan" early that morning in normal weather. However, a squall and/or ground sea began to build up during the morning, and reached a point of intensity about noon, or afternoon, where these barges could not discharge their cargo ashore, but had to be taken to their moorings for the night. Two such barges were taken there, one survived the storm for the night, and the barge in question ("B-2") lost its cargo into the sea. It is for the loss of this cargo that libellant brings suit and alleges negligence on the part of the respondent, and claims the following:

1. That the barge in question ("B-2") was unseaworthy.

2. That respondent was negligent in accepting the cargo from the "SS Alcoa Puritan" under the prevailing weather conditions.

3. That respondent was negligent in not lashing down the cargo on the barge "B-2" before mooring it for the night, as was done on another barge which did not lose its cargo.

Respondent argues in response to these claims that it was not negligent in that: (1) The barge "B-2" was in seaworthy condition. (2) That the storm was a "freak"

storm, which came up suddenly, and that it had no notice of the storm when it accepted the cargo, but the storm so suddenly increased in intensity that it had to move the barge from the ship "SS Alcoa Puritan" to keep it from breaking up against the ship; and (3) That the cargo could not be lashed down due to the roughness of the sea, and that therefore the cargo was lost by "act of God", and no negligence of the respondent contributed thereto.

This Court has heard extensive argument on the amount of liability, if any, but before we go into that question we must first consider whether the respondent is liable for the loss by its negligence. There is no dispute that the cargo upon the barge "B-2" was lost during the night as a result of the storm, while it attempted to ride the storm at its moorings. There is also no dispute of the value of the total loss, which was $27,821.48. The dispute hinges over whether respondent was negligent, either before or in the face of the storm. That question must be decided first before going into the extent of the total sum for which defendant is liable, if negligence is found. It must be noted that suit herein was filed more than two years after the loss, and this testimony taken about two and one-half years after the loss, and that there is, therefore, much conflict of testimony as to details and especially as to times of day of the various operations and sequence of happenings of the various operations, as well as the condition of the weather at the various times of the day.

The evidence seems to establish the following: That the rough sea began to build up about 10 A.M.; that landing operations of the barges were completed about 3:30 or 3:45 P.M.; that, either at that time or some time before, it was discovered that the sea was breaking in and was too rough for the barges to go ashore, and that they would have to be taken to the moorings to await abate-

ment of the rough sea. Both barges were taken to the moorings. The storm, however, increased in intensity during the night, and some time between 12 midnight and 2 A.M. the packages on barge "B-2" were washed into the sea. The packages on the plywood barge were not washed into the sea. That the packages on barge "B-2" were not lashed down, and that the packages or cargo on the plywood barge were lashed down. The questions unanswered by the evidence are: (1) Whether the barge "B-2" was fully or partially loaded when it was discovered that the barges could not reach the dock. (2) Whether barge "B-2" and the plywood barge were loaded at the same time, or which was loaded first. (3) Whether either had discharged any previous loads at the dock. (4) Whether the lashing down would have saved the cargo on barge "B-2," and, finally, whether, in the sudden rough weather, this cargo could have been lashed down. The only conclusion from the evidence is that it could not, as it was too hazardous.

On this latter point Henry Walcott, a witness for the libellant, testified as follows: That the sea was not rough when barge "B-2" was brought alongside the "SS Alcoa Puritan," and he cannot remember what time the barge was brought alongside ship, and that he cannot remember how long it took to load the barge. The barge was not loaded to capacity. That he tried to lash the cargo down after the sea got rough, but was unsuccessful. That he was the pump man, but the barge "B-2" was not leaking. There were four other men on the barge. And, in answer to questions from libellant's proctor concerning them, he answered as follows: "Q: Were the other four men trying to lash her down? A: They were doing it. Q. Did you not have four other men who could help you? A: They had already leave the ship. The four men stay on the next lighter." (This is presumably the plywood lighter where the cargo was successfully lashed down), and finally verified a statement made to the libel-

lant's proctor that "If it ("B-2") had been kept alongside the ship long enough to lash the cargo down, the barge might have been smashed up, so they stopped trying to lash the cargo down and went right from the ship's side to the mooring." The evidence does not show further whether the sea was too rough to lash it down, either at the mooring or en route thereto, but the evidence of this and other witnesses tend to show that it was a dangerous operation. This witness stayed on barge "B-2" until the middle of the night when it discharged its cargo into the sea and then he swam ashore.

While some portions of the evidence conflict, it is clear that the weather was calm in the morning and attained gale force at night; that the weather was freakish and unpredictable and that the storm was the direct cause of the loss of the cargo. From the state of the testimony, it is not clear, beyond a fair preponderance of the evidence, that there was negligence on the part of the defendant or its agents which directly contributed to the loss of the cargo, when all things are considered, to wit: The Frederiksted seaport is an open roadstead and the stormy weather occurred during what is known in the islands as "the hurricane season"; that the storm that day was rather sudden, freakish and unpredictable. There is no evidence that the barge "B-2" was unseaworthy. The foreman and longshoremen engaged in the lightering of the cargo were veterans in this work, some with over fifteen years of experience. From the evidence it appears that both the plywood lighter and the "B-2" went out to lighter the cargo; that it was only after the plywood lighter discovered that it could not return to the dock that it was decided to take the "B-2" to the mooring on account of the bad weather; that the rough seas and squally weather prevented the lashing down of the cargo on the "B-2" and, even if it were lashed down, there is no certainty that the "B-2" would not have foundered and the cargo sunk. While it is true that it would have been

better not to have taken on the cargo, it must be remembered that at the time the lighters went out to the "SS Alcoa Puritan" the weather presented no threat to the lighters or cargo; that this hazard subsequently developed, and the "SS Alcoa Puritan" itself was obliged to fight the stormy weather and heavy swells. The evidence shows that the "B-2" could not remain close to the "SS Alcoa Puritan," and, as it could not go to the dock, there was nothing else to do but tow it to the mooring. There is no evidence that any public or official notice was given of an impending storm, as is usually the case when a storm is anticipated. The evidence and records of the officer from the Coast Guard Station at Frederiksted does not reveal any such storm brewing.

Describing the treacherous and unpredictable kind of weather that day and often times experienced at the Frederiksted roadstead, I quote from the testimony (pages 71 and 72) of the witness Anthon Roberts, one of the foremen in charge of the lighters, with fifteen years of experience lightering at Frederiksted:

"Q: Would you say that this storm that occurred was a normal rough sea, or was it anything unusual from your experience working on the water front? A: I think it was a freak, because the morning was pleasant; that just come in suddenly.

"Q: Were there any warning that it was going to come up or turn into a squall? A: No, because I spoke that with Lucas. I told him, I say, we were there all the time and suddenly this gush of wind came and then the heavy sea followed it immediately.

"Q: What would you call it, a storm, or something local? A: I figured it was a storm, so I told Lucas may be there must have been some storm passing around and nobody had reported it.

"Q: How was it acting, this sudden squall; was it a steady affair? A: We had gushes of wind and rain. It was blowing in a gushing form.

"Q: What would be your estimate of the height of the sea that night? A: When we were there?

"Q: Yes? A: I figure it from the waves—I think we had seas about twelve feet.

"Q: Were there occasions when you worked on the dock before. Have you had much experience there? A: I work there now, I should think nearly fifteen years, because I am thirty-nine. I used to be around there from the time I was about twenty.

"Q: You recall this as an unusual sea? A: Yes, sir. That is the first of my working that I have seen one like that. It had one once, I don't know if you could call it an experience in Court, but I know one night I went to sleep and leave it very calm. The morning I get up I found at the Custom House the big boat all mash up and the sea was calm. That happened while I was asleep."

This Court agrees fully with the argument of proctor for the libellant herein that the respondent cannot claim an act of God if its negligence in the circumstances also contributed to the loss, but in the state of the testimony herein this Court is of the opinion that from the evidence it cannot be said that the testimony proves negligence by a fair preponderance, without the unwarranted assumption that despite Henry Walcott's testimony the sea was not too rough to lash down the cargo on barge "B-2." There is no evidence to show that the sea was not too rough, or the operation not too hazardous.

Finding, must, therefore, be for the respondent, and order may be thus drawn.

Dated at Charlotte Amalie, St. Thomas, Virgin Islands, this 28th day of February, 1957.

HERMAN E. MOORE
District Judge

Abstract of Motion Filed 12 March 1957

Pursuant to Rule 59, Rules of Civil Procedure, libellant moves Court to postpone entering judgment and to amend written opinion after further argument on negligence.

ORDER

Upon consideration of the motion filed by the Libellant in the above-entitled cause, moving the Court to postpone entering judgment and to amend its written opinion, and to direct the entry of a judgment only after further argument on the issue of negligence; and this motion having come on to be heard and the arguments of counsel for both the Libellant and Respondent having been fully heard by the Court;

NOW THEREFORE, it is by the Court this 23rd day of May, 1957:

ORDERED, that said motion be and the same hereby is denied.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Seal of the Court to be affixed, on the day and year first above noted.

/s/ Herman E. Moore
Judge

JUDGMENT

This matter having come on for hearing on June 15th and September 21st, 1955, the Libellant appearing by its proctor, Warren H. Young, Esq., and the Respondent appearing by its proctor, John D. Merwin, Esq., and the proof's on the part of the Libellant and of the Respondent having been duly submitted and heard, and both parties having submitted briefs and presented oral argument in

support of same, and the Court having duly considered the foregoing and having rendered an opinion herein, dated the 28th day of February, 1957, and on motion of John D. Merwin, Esq., proctor for the Respondent, it is

ORDERED, ADJUDGED, AND DECREED that judgment be, and it is hereby entered in favor of the Respondent, Merwin Lighterage Co., Inc., and against the Libellant, Virgin Islands Corporation, and that the libel herein be, and it is hereby, dismissed; and, it is

FURTHER ORDERED, ADJUDGED, AND DECREED that each party hereto shall bear its respective court costs and attorney's fees.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Seal of the Court to be affixed this 23rd. day of May, 1957, A. D.

HERMAN E. MOORE
Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,305

VIRGIN ISLANDS CORPORATION,
Appellant

v.

THE MERWIN LIGHTERAGE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS,
DISTRICT OF ST. CROIX

Argued December 20, 1957

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 7, 1958)

HASTIE, *Circuit Judge.*

We have here a dispute concerning legal responsibility for damage to cargo in the course of lighterage from ship to shore at the Port of Frederiksted in the Virgin Islands of the United States. This appeal has been taken by the libellant Virgin Islands Corporation, which was the owner and consignee of the cargo. It sued The Merwin Lighterage Company, a private carrier which had custody of the cargo at the time it was damaged. The cargo was machinery, a disassembled generator, packed in some 28 crates and boxes.

At the Port of Frederiksted there is no harbor or protected anchorage. For a Frederiksted call, an ocean going vessel anchors in an open roadstead a quarter mile or more from shore. There cargo is transferred to lighters which carry it to be landed at a small wharf which extends out a short distance from the margin of the strand. The open roadstead and the wharf itself are entirely exposed to the action of wind and wave.

On the August day in question a ship was anchored in the Frederiksted roadstead completing the discharge of cargo for that port. Respondent's lighters were accomplishing the ship to shore transfer. Late in the morning a shifting wind, a tended by rain squalls and increasing seas, hampered the unloading and landing to the extent that operations were suspended. Somewhat later this work was resumed and by midafternoon the last of the Frederiksted cargo had been transferred from the ship to two lighters designated as the "plywood barge" and the "B-2". There is uncontradicted evidence that the "B-2" was the last loaded.

By the time the loading of the last of the cargo upon these two lighters had been completed, the action of waves beating and breaking in toward the shore had again made the use of the wharf difficult. In the circumstances, it was decided to take the two loaded barges to their moorings, a short distance off shore, and to leave them there overnight with a view to landing the cargo in more favorable weather the next day. However, during the night the weather became worse. No harm came to the "plywood barge" or its cargo. But libellant's crates of machinery was cast from the deck of the "B-2" into the sea. Although this cargo was later salvaged it had suffered great damage for which this suit has been brought.

The libellant asserts that the loss in suit was caused by the negligence of the respondent bailee. The defense is that the loss of the cargo overboard was an "inevitable

accident" caused by "an extreme and sudden storm and unprecedented high seas which could not reasonably have been anticipated". After full hearing the district court found that the loss had resulted from "inevitable accident" and entered a decree exonerating the respondent.

We are unable to sustain this judgment. In our view the undisputed facts, evaluated in the light of correct legal principles, compel a finding that the respondent did not exercise due care for the protection of libellant's property.

We accept the district's court's finding that the storm which developed during the night was more severe than could reasonably have been foreseen. But the fact that unusually severe weather has been a factor in causing cargo damage is not enough to establish the defense of "inevitable accident" resulting from a "peril of the sea". It must also be shown that weather conditions were more than a staunch and adequately equipped vessel, with its cargo properly secured, could have withstood. *Eastern Gas & Fuel Associates v. Martin Marine Transp. Co.*, 3d Cir. 1951, 190 F.2d 394, 396-97; *The Plow City*, 3d Cir. 1941, 122 F.2d 816, 818, *cert. denied*, 315 U.S. 798; *Norris Grain Co. v. Great Lakes Transit Corp.* 7th Cir. 1934, 70 F.2d 32, *cert. denied*, 293 U.S. 565.

The facts already stated and additionally undisputed facts make it clear that failure of the respondent to secure the cargo on the "B-2" was a substantial factor in this mishap. Topside, the "B-2" had a flat deck with no railing or other structure to restrict the lateral movement of objects placed upon the deck. There were, however, ring bolts, cleats, fasteners and rope, constituting appurtenances and gear suitable for lashing down deck cargo. However, the district court explicitly found that on this occasion the crates of machinery were placed and left on this deck without being lashed down. In contrast, the cargo on the "plywood barge", which had been loaded just ahead of the "B-2", was lashed down with ropes. Left at

their moorings near the Frederiksted shore overnight these two loaded barges had contrasting experiences. The lashed cargo rode out the storm on the deck of the "plywood barge" The unsecured cargo was cast overboard from the "B-2". This unusual situation of the contrasting experiences of two lighters moored in the same roadstead during a storm compels the conclusion that this mishap was not an inevitable accident. This court has had occasion more than once to reverse a finding of inevitable accident when the record has showed that the weather, though bad, was less than catastrophic and that some reasonable precaution could have been taken to protect vessel or cargo against its impact. *Swenson v. The Argonaut*, 3d Cir. 1953, 204 F.2d 636; *Eastern Gas & Fuel Associates v. Martin Marine Transp. Co., supra; The Plow City, supra.* This is plainly such a case.

There is another legal rule, applicable to the loss of goods at sea by a private carrier, which is significant for the evaluation of the evidence in this case, although the trial court did not allude to it. Although a libellant who claims damages for the loss of his property during bailment has the burden of proof as to negligence, the very fact that a private carrier has lost the goods entrusted to it creates such an inference of fault that the carrier must come forward with some exculpatory showing. *Schnell v. The Vallescura*, 1934, 293 U.S. 296, 305; *The S. C. L. No. 9*, 3d Cir. 1940, 114 F.2d 964, 968; *Aetna Ins. Co. v. Florida Towing Corp.*, S.D. Fla. 1941, 37 F. Supp. 781.

Here, far from being exculpatory, the evidence reinforces the presumption of fault on the part of the bailee. The district court in its opinion observed "there is no evidence to show that the sea was not too rough [for lashing down the cargo of the 'B-2'], or the operation not too hazardous". This statement ignores the above stated burden of going forward with evidence. But beyond that, there was affirmative indication that it would have been

feasible to secure this deck cargo. First, the cargo of the "plywood barge", loaded only a short time before the "B-2" was lashed down. Second, weather observations taken from the log of the ship from which the cargo in question was unloaded were in evidence. They showed Force 3 winds at midday, diminishing to Force 2 at 4 P.M., by which time the loaded barges had been towed away from the ship. Thus, except for possible gusts or squalls of short duration, the winds are shown to have been gentle or slight during periods when the securing of the cargo could have been undertaken. Moreover, to sustain the picture of a severe and unexpected storm late that night witnesses for respondent contrasted the very severe late evening weather with the moderately rough but not unusual seas created by shifting wind and occasional squalls in the afternoon and early evening.

With particular reference to lashing, there was testimony that employees of the respondent started to lash down the cargo while the "B-2" was being loaded alongside the ship. However, wave action was pounding the lighter against the ship's hull and it was deemed expedient to load as quickly as possible so that the lighter could be towed away from the ship. This was done. But in this record the failure again to undertake the securing of the cargo after the lighter was clear of the ship remains wholly unexplained, except for testimony that all of the respondent's employees except one left the lighter very soon after it was loaded. And this remaining lighterman testified that the lashing operation would have been too much for him alone. All of this gives a picture of neglect of an obvious and indicated precaution, not of natural forces making that precaution impracticable.

On the entire record we cannot avoid conclusion that respondent's fault, as well as the stormy weather, played a substantial part in this unfortunate mishap. The district court should have so found and, therefore, should have held the respondent legally liable for the cargo loss.

Both sides recognize that there is an issue concerning limitation of liability which the district court did not reach in its disposition of the libel. However, our disposition of the question of liability will make it necessary that the district court consider and decide whether there has been an effective limitation of liability.

The judgment will be reversed and the cause remanded for further proceedings consistent with this opinion.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded for further proceedings consistent with the opinion of this Court.

Attest:

IDA O. CRESKOFF
Clerk

February 7, 1958

Received and filed, February 7, 1958
Ida O. Creskoff, Clerk.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 984

MERWIN LIGHTERAGE CO., INC.,

Petitioner,

v.

VIRGIN ISLANDS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

F. HERBERT PREM,
WARREN H. YOUNG,
Counsel for Respondent.

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IN THE

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OCTOBER TERM, 1957

No.

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BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

Statement

This case involves no principle which has not been decided by this Court. The decision of the Court of Appeals for the Third Circuit, which is sought to be reviewed, reversed a decree for petitioner, in admiralty, which was contrary to the evidence and well settled admiralty doctrine.

There is no conflict between the decision of the Court of Appeals and the decision of any Court referred to in petitioner's brief, and, so far as we are aware, that of any other appellate Federal court.

Petitioner's statement of the facts in relation to the character of the sea and weather and the circum-

stances attending petitioner's failure to lash respondent's cargo on the barge "B-2" is inadequate and some further statement of the facts seems necessary to a right understanding of the case.

The S.S. "Alcoa Puritan" anchored off Frederiksted on the evening of August 25, 1952. Petitioner sent four lighters and its stevedore personnel out to the ship. The lighterage operations continued through the night without incident. About 10 o'clock the following morning, the weather shifted with rain squalls and increasing seas (transcript, pp. 42, 48, 56). By noon, the increasing sea conditions made it impossible to bring any more lighters to the dock (trans., pp. 46, 48, 57).

After the lunch hour, petitioner's dock foreman sent out instructions to petitioner's foreman on the ship that he could not accept any more cargo from lighters (trans., p. 74). However, petitioner's foreman in charge of unloading the "Alcoa Puritan's" cargo continued to load lighters, with the knowledge that they would have to be moored in the open roadstead with their cargoes on deck (trans., p. 63). All cargo was unloaded from the "Alcoa Puritan" by 3:45 P. M. (trans., p. 89). The "B-2", which had received respondent's cargo, was the last lighter to be loaded (trans., p. 63). During the time the "B-2", was being unloaded alongside the "Alcoa Puritan", petitioner had five lightermen on her who proceeded to lash down the cargo. They discontinued that work to assist in removing the lighter from alongside the ship to prevent injury to the lighter through striking the ship's side (trans., pp. 22-23). When the launch towed the "B-2" away from the ship, four of the men got off, leaving only one man on board to attempt to lash

respondent's cargo (trans., p. 23). This lone lighterman remained on the "B-2" from 3:45 P. M., the time it had received its cargo (trans., p. 18), until 2:00 A. M. the next morning, by which time all of the cargo, except one crate, had slid off the deck of the pitching and rolling lighter into the sea (trans., p. 14). Another of petitioner's lighters known as "plywood", which was also moored in the roadstead, was loaded with respondent's cargo of the same character as that laden in the "B-2", with this important difference—the "plywood" cargo was lashed and the "B-2" cargo was not lashed.

The key fact of this case appears in the following excerpt from the opinion of the Court of Appeals:

> "the district court explicitly found that on this occasion the crates of machinery were placed and left on this deck without being lashed down. In contrast, the cargo on the 'plywood barge', which had been loaded just ahead of the 'B-2', was lashed down with ropes. Left at their moorings near the Frederiksted shore overnight these two loaded barges had contrasting experiences. The lashed cargo rode out the storm on the deck of the 'plywood barge.' The unsecured cargo was cast overboard from the 'B-2'. This unusual situation of the contrasting experiences of two lighters moored in the same roadstead during a storm compels the conclusion that this mishap was not an inevitable accident" (petitioner's appendix, pp. 33-34).

The official records of the United States Coast Guard and the testimony of the Coast Guard lighthouse attendant show that no unusual weather or seas were recorded, and certainly none of the character that the decisions refer to as constituting a

technical peril of the sea i.e., "irresistible force or overwhelming power" (*The Giulia*, 218 F. 744, 746 (C. A. 2)).

At about the time the "B-2" was loaded and taken away from alongside the ship (4:00 P. M.), there was a northwest wind of force 2 on the Beaufort Scale, between 4 and 7 miles per hour—a "light breeze" (app. to appellee's brief in Court of Appeals, p. 2a). The log entries of the ship from which the "B-2" received respondent's cargo show no unusual sea or weather conditions (app. to appellee's brief in the Court of Appeals, p. 3a).

The testimony of the Coast Guard lighthouse attendant is that at no time during that day were the swells over five feet with the highest wind force at 18 knots; that during the night, when the cargo was cast overboard, the swells measured 6½ feet, with a wind force of ten knots; and the following morning the swells were down to five feet (testimony, pp. 31-33).

In response to a question by the district court, this witness said that he did not consider seas between six and six and one-half feet rough weather in Frederiksted harbor (testimony, p. 34). He testified that a storm or unusual wind condition occurs when the wind force is from 53 to 63 miles an hour; that on August 26-27, the material time in this action, the highest wind force was eighteen miles an hour, which was a light or moderate breeze (testimony, pp. 35-36).

With respect to petitioner's failure to lash respondent's cargo, viewed in the light of the government's weather records and testimony of the official govern-

ment observer, it is readily apparent that under the existing sea and weather conditions there was nothing to prevent the petitioner from lashing the respondent's cargo on the "B-2", as was done on the other barge which did not lose its cargo. As to this feature of the case, the Court of Appeals said (pet. app., p. 35):

> "* * * weather observations taken from the log of the ship * * * were in evidence. * * * except for possible gusts or squalls of short duration, the winds are shown to have been gentle or slight during periods when the securing of the cargo could have been undertaken. * * * the failure again to undertake the securing of the cargo after the lighter was clear of the ship remains wholly unexplained, except for testimony that all of the respondent's employees except one left the lighter very soon after it was loaded. And this remaining lighterman testified that the lashing operation would have been too much for him alone. All of this gives a picture of neglect of an obvious and indicated precaution, not of natural forces making that precaution impracticable."

None of petitioner's witnesses testified that it would have been dangerous to have lashed, or tried to lash, the cargo on the "B-2". The pumpman who was the only person on the "B-2", did not testify that there was any danger in lashing the cargo; he testified only that it would have been dangerous to the barge alongside the ship, where waves caused it to surge against her side. The pumpman testified that although he tried, "I alone could not lash it down" (testimony, p. 7). The pumpman being the sole person on the "B-2", he was the only person in position to state whether the sea was too rough to secure the cargo, and

he testified that the barge was not rolling at that time (testimony, p. 10).

The Court of Appeals in ruling that petitioner did not exercise due care for the protection of respondent's property observed that its finding is based upon "undisputed facts" (pet. app., p. 33). In reaching that decision the Court of Appeals accepted the finding of the district court that the storm, during the course of which the cargo was cast overboard, was more severe than could reasonably have been foreseen (pet. app., p. 33).

While crediting the evidence accepted by the district court, the Court of Appeals ruled that the former, in finding that the petitioner was not negligent and that the storm was the direct cause of the loss of the cargo, had failed to evaluate the facts in the light of correct legal principles (pet. app., pp. 33, 34-35).

The argument of petitioner appears to be that the district court's findings are not clearly erroneous and, therefore, the Court of Appeals erred in ruling that respondent's loss was proximately caused by petitioner's negligence (pet. app., p. 35).

The Issues

As appears from the foregoing Statement, the petition presents three issues, two of which are factual: (a) whether a technical "peril of the sea" existed, and (b) whether, in view of prevailing sea and weather conditions, it was practical for petitioner to have lashed the cargo on the "B-2". The remaining issue

is one of law dealing with a question of burden of proof, in respect of which the district court made a finding contrary to the ruling in *Schnell* v. *The Vallescura,* 293 U. S. 296, 305, and other decisions of this Court. The Court of Appeals, in reversing, resolved all of the aforementioned issues against the petitioner.

No question of law is presented upon which the Courts have disagreed. The two issues of fact do not concern any elements of important public interest and, moreover, they relate to questions to which established principles of law were applied by the Court of Appeals. The Court of Appeals reversed the district court because it had erred in the application of accepted principles.

Two dispositive conclusions were formulated by the Court of Appeals, viz. (pet. app., pp. 33, 35):

> "In our view the undisputed facts, evaluated in the light of correct legal principles, compel a finding that the respondent did not exercise due care for the protection of libellant's property" (pet. app., p. 33).
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> * * * *
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> "On the entire record we cannot avoid conclusion that respondent's fault, as well as the stormy weather, played a substantial part in this unfortunate mishap. The district court should have so found and, therefore, should have held the respondent legally liable for the cargo loss" (pet. app., p. 35).

We shall consider petitioner's "Questions Presented for Review", in the order in which they appear in the petition.

Question 1

The contention here advanced is that the Court of Appeals erred when it found petitioner guilty of negligence.

Petitioner's negligence was established in the following particulars:

(a) Because the character of the storm was not such as to establish that a technical "peril of the sea" existed.

(b) Because the sole lighterman on the "B-2" testified that it was not the condition of the sea that prevented the cargo from being lashed down; that on the contrary it was due to the fact that the other four lightermen had abandoned the barge and he could not perform the job alone.

(c) Assuming that the sea and weather conditions were such as to fall within the technical classification of "peril of the sea," that defense is not available to a carrier where there is concurrent negligence on its part.

As to sub-division (a) above:

The Court of Appeals ruling that "unusually severe weather * * * is not enough to establish the defense of 'inevitable accident' resulting from a 'peril of the sea'" and that

> "it must also be shown that weather conditions were more than a staunch and adequately equipped vessel, with its cargo properly secured, could have withstood" (pet. app., p. 33),

is in accord with long established authority.

In *The Giulia*, 218 F. 744 (C. A. 2), the Court said (p. 746):

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

To the same effect:

> *The Rosalia*, 264 F. 285, 288 (C. A. 2);
> *Waterman S.S. Corp.* v. *United States S. B. & M. Co.*, 155 F. (2d) 687, 692 (C. A. 5); cert. den. 329 U. S. 761;
> *The Edith*, 10 F. 2d 684, 686 (C. A. 2).

The English Courts have characterized a "peril of the sea" as

> "* * * something which could not be forseen as one of the necessary incidents of the adventure".
> (*Thomas Wilson, Sons & Co.* v. *The Xantho*, 12 App. Cas. 503, 509).

The Court of Appeals below applied the foregoing rule in the following language (pet. app., p. 34):

> "This court has had occasion more than once to reverse a finding of inevitable accident when the record has showed that the weather, though bad, was less than catastrophic and that some reasonable precaution could have been taken to protect vessel or cargo against its impact."

As appears from the testimony of the only lighterman on the "B-2", referred to in the Statement to this brief, no such circumstance was present in this case and, measured by the criteria quoted above, the

district court's finding that the loss of respondent's cargo is attributable to inevitable accident or peril of the sea (pet. app., p. 33), is clearly erroneous. It was so held by the Appellate Court (pet. app., p. 35).

It frequently has been held that it is inexcusable negligence for a carrier properly to secure deck cargo and, where cargo is lost in storms at sea because of inadequate lashing, its liability is thereby established.

> *Waterman S. S. Corp.* v. *United States S. R. & M. Co., supra*;
> *U. S. Industrial Alcohol Co.* v. *Calmar S.S. Corp.*, 53 F. 2d 1023, 1024 (S. D. N. Y.); reversed on other grounds, 57 F. 2d 182;
> *The Carlos*, 237 F. 731, 733 (N. D. Cal.).

Under its Point VII E, petitioner argues that the Court of Appeals' finding that the contrasting experience of the two lighters (the lashed cargo of the plywood barge rode out the storm while the unsecured cargo of the "B-2" was cast overboard), is not material upon the issue of petitioner's negligence. In support of its argument, petitioner advances the contention (brief, p. 20) that the plywood barge, being the larger of the two, was able to ride the waves whereas the "B-2" cast her deck load because "the barge was too short to ride those waves" (brief, p. 16).

This admission establishes the unseaworthiness of barge "B-2", as well as the negligence of petitioner in the use of the barge, for petitioner's operating

manager admitted that the "B-2" was unseaworthy to carry respondent's cargo in a rough sea (testimony, p. 97); and that it was supposed to be used only under normal conditions when the cargo could be brought to shore (testimony, p. 29). Petitioner is thus shown to have been negligent in using a lighter that was not designed to ride out rough weather in the open roadstead with cargo on deck. Despite the foregoing undisputed testimony, the district court found that there was no evidence that the "B-2" was unseaworthy (pet. app., p. 26). We submit that the district court's failure to find that the "B-2" was unseaworthy for the carriage of deck cargo under the conditions which prevailed during the transfer of respondent's cargo from ship to shore, is clearly erroneous because it is in direct conflict with the undisputed testimony of petitioner's operating manager in the particulars specified above. The standard of seaworthiness for a barge was prescribed by this Court in *The Northern Belle*, 9 Wall. 526, at 530:

> "It is the duty of the carrier to see that his barge is capable of resisting these forces (of wind and wave) without subjecting the cargo to injury. She must be * * * so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected."

Under its Point VII D (brief, p. 19), petitioner argues that its failure to lash down the cargo on barge "B-2" was an act done in the "navigation" of the barge and not an act of negligence in breach of its duty as bailee to care for respondent's cargo. The authority cited by petitioner in support of its contention is *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104.

The petitioner has misapprehended the ruling of this Court in that case. Petitioner asserts that the sinking of the barge in the *Commercial Corp.* case, *supra,* was due to the act of the bargee in turning a wrong valve which overloaded its tanks and that this Court held the same

> "to constitute an error in navigation and thus was not negligence."

The ruling in question is found in the following excerpt from the opinion of this Court (314 U. S., at p. 106):

> "If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could limit liability. R.S. 4283, 46 U. S. C., Sec. 183."

Sec. 183 of 46 U. S. C., upon which petitioner's contention is predicated, is, or course, the statute which provides for the limitation of liability of a shipowner for the loss of goods shipped on his vessel, occasioned without the privity or knowledge of such owner, to the value of his interest in the vessel and her pending freight.

Section 183 contains no provision for exoneration of a shipowner due to an error in navigation. That relief is accorded a vessel owner under Sec. 192 of 46 U. S. C. (Sec. 3 of The Harter Act), which provides that if a vessel owner shall exercise due diligence to make his vessel in all respects seaworthy, properly manned, equipped, or supplied, her owner shall not become responsible for damage

> "resulting from faults or errors in navigation or in the management of said vessel."

It is clear, therefore, that petitioner has misinterpreted the two statutes. Moreover, the benefits of Section 192 do not apply to a private carrier (as was the petitioner herein), except in case of special agreement. No such special agreement existed.

> *Koppers Connecticut Coke Co.* v. *James McWilliams Blue Line,* 89 F. 2d 865; (C. A. 2) cert. den. 302 U. S. 706;
> *Norris Grain Co.* v. *Empire Canal Corp.,* 42 F. 2d 482 (reversed on other grounds 52 F. 2d 41) (C. A. 2);
> *The Raleigh,* 50 F. Supp. 961 (D. Md.).

Finally, in *The Germanic,* 196 U. S. 589, 597-598, this Court held that "where the primary purpose is to get the cargo ashore" a carrier, otherwise entitled thereto, may not invoke the "navigation and management" provisions of the third section of the Harter Act.

As to sub-division (b) above in which petitioner contends that it was unable, because of the prevailing conditions, to lash the cargo on the "B-2", the Court of Appeals found that

> "there was affirmative indication that it would have been feasible to secure this deck cargo" (pet. app., pp. 34-35).

It is conceded that the cargo on the "plywood" barge, which was loaded and *lashed down* only a short time before the "B-2" completed loading, lost none of its cargo (pet. brief, p. 4; testimony, p. 7).

The evidence concerning the absence of any extraordinary sea or weather conditions during the period

the cargo could have been lashed on the "B-2" and that the reason for not lashing the same was lack of manpower, is discussed in the Statement to this brief.

The Court of Appeals found that petitioner's

> "failure again to undertake the securing of the cargo after the lighter was clear of the ship remains wholly unexplained, except for testimony that all of respondent's employees except one left the lighter very soon after it was loaded" (pet. app., p. 35).

As to the winds which prevailed at the time the barges were towed away from the ship, the Court of Appeals found that they were

> "gentle or slight during periods when the securing of the cargo could have been undertaken" (pet. app., p. 35).

The aforementioned facts, said by the Court of Appeals to be "undisputed" (pet. app., p. 33), establish the finding of the district court that

> "there is no evidence to show that the sea was not too rough (for lashing down the cargo on the B-2), or the operation not too hazardous" (pet. app., p. 28),

to be clearly erroneous, as was held by the Court of Appeals (pet. app., pp. 34-35).

However, if it be assumed that the trial judge was correct in ruling that the record contains no such evidence, that circumstance would not avail the petitioner because it failed to discharge its burden of proof of making an exculpatory showing. This long

established rule of law was referred to by the Court of Appeals in the following language:

> "There is another legal rule, applicable to the loss of goods at sea by a private carrier, which is significant for the evaluation of the evidence in this case, although the trial court did not allude to it. Although a libellant who claims damages for the loss of his property during bailment has the burden of proof as to negligence, the very fact that a private carrier has lost the goods entrusted to it creates such an inference of fault that the carrier must come forward with some exculpatory showing. Schnell v. The Vallescura, 1934, 293 U. S. 296, 305; The S. C. L. No. 9, 3d Cir. 1940, 114 F. 2d 964, 968; Aetna Ins. Co. v. Florida Towing Corp., S. D. Fla. 1941, 37 F. Supp. 781.
>
> Here, far from being exculpatory, the evidence reinforces the presumption of fault on the part of the bailee" (pet. app., p. 34).

As appears in the excerpt quoted above, the rule was applied by this Court in *Schnell* v. *The Vallescura*, *supra*, at pp. 304-305, as well as in *Commercial Corp.* v. *New York Barge Corp.*, 314 U. S. 104, 111; *The Edwin I. Morrison*, 153 U. S. 199, 212; *The Northern Belle*, 9 Wall. 526, 529, and other cases. As was said in *Commercial Corp.* v. *New York Barge Corp.*, *supra* (p. 111):

> "Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him."

As to sub-division (c) above: The rule has been long established that a carrier may not secure exonera-

tion under the defense of "peril of the sea" where its negligence contributed to the loss. *Clark* v. *Barnwell*, 12 How. 272; *The Edwin I. Morrison*, 153 U. S. 199.

Wholly apart from the question of whether a technical "peril of the sea" existed, petitioner's negligence in furnishing barge "B-2", which was concededly too short and unsuitable to carry deck cargo in a storm, together with its additional negligence in loading the barge after it was aware that it would have to ride out stormy weather with cargo on its deck, and in failing to lash down the cargo thereon, were concurring faults. Therefore, it appears that the district court, additionally, was clearly in error in failing to apply to the circumstances of this case the rule of law stated by this Court in *Schnell* v. *The Vallescura*, *supra*, and the other cases hereinabove cited.

In *Clark* v. *Barnwell*, *supra*, this Court said (p. 280):

> "Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable."

In *The Edwin I. Morrison*, *supra*, this Court said (p. 211):

> "Perils of the sea were excepted by the charter party, but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed."

Question 2

The petitioner here urges that the findings of the trial court are not clearly erroneous and, accordingly, the Court of Appeals should not have reversed.

In *McAllister* v. *United States*, 348 U. S. 19, this Court said (p. 20):

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

The evidence showing that the sea and weather conditions were not unusual and did not prevent the cargo from being secured but that such failure was due solely to the fact that the care of the "B-2" was abandoned to one lighterman who was unable, alone, to lash the cargo, is reviewed in the Statement to this brief.

We, of course, are in accord with petitioner's argument, under its Question 2, that if the district court's findings are not clearly erroneous, the Court of Appeals did not have the power to reverse. We submit that the trial judge's findings in the respects hereinabove referred to, are clearly erroneous, relating, as they do, to key facts and fundamental rules of law. We submit further that the Court of Appeals' reversal accords complete recognition to the qualification stated by this Court in *United States* v. *Gypsum Co.*, 333 U. S. 364, 395:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

> on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

That the Court of Appeals had such conviction is shown by the following excerpt from the opinion (pet. app., p. 35):

> *"On the entire record we cannot avoid conclusion* that respondent's fault, as well as the stormy weather, played a substantial part in this unfortunate mishap. The district court should have so found and, therefore, should have held the respondent legally liable for the cargo loss" (pet. app. 35). (Emphasis supplied.)

Question 3

As petitioner under this question engages in erroneous assumptions, both of law and fact, we think its argument requires no more than cursory attention. Petitioner erroneously assumes:

(a) its failure to lash down the cargo on barge "B-2" was not negligence;

(b) that the storm was of such character as to constitute a "peril of the sea."

In addition to the foregoing, petitioner fails to accord recognition to the rules of law announced by this Court in

(a) *Clark* v. *Barnwell, supra*, as to the availability of the defense of "peril of the sea" where a carrier's negligence contributes to the loss;

(b) *Schnell* v. *The Vallescura, supra*, as to a carrier's burden to come forward with some exculpatory showing; and

(c) *The Northern Belle, supra*, as to the duty of a carrier to provide a barge conforming to the standard of seaworthiness prescribed therein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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